82-631

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERBERT W. TIMMS, dba PETROL EXPRESS, GAS-A-TRON OF ARIZONA; GAS-A-TRON CORPORATION; PETROL EXPRESS COOPERATIVE; PETROL STOPS, LTD - RIO LINDA and PETROL STOPS NORTHWEST, Petitioners

v.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

FRED LUYTIES
P. O. Box 2268
Tucson, Arizona 85702
(602) 622-3531
Attorney for Petitioners

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QUESTION PRESENTED FOR REVIEW

Whether a contractual ambiguity may be resolved by the court in a summary judgment proceeding where there is more than one reasonable interpretation of the ambiguous language and where there is a dispute in the underlying facts.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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v.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully request this Court to issue its Writ of Certiorari to review the decision by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A, infra, is reported at 678 F.2d 831.

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing, Appendix B, infra, is not reported. The Order of the United States District Court for the District of Arizona, dated July 31, 1980, Appendix C, infra, is reported at 80-2 U.S.T.C. ¶9614.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on June 4, 1982. The Petition for Rehearing was denied by the Ninth Circuit on July 7, 1982. This Petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 530 of the Revenue Act of 1978, P.L. 95-600, as amended by P.L. 96-541, provides in pertinent part as follows:

"SEC. 530. CONTROVERSIES INVOLVING WHETHER INDIVIDUALS ARE EMPLOYEES FOR PURPOSES OF THE EMPLOYMENT TAXES.

(a) TERMINATION OF CERTAIN EMPLOYMENT TAX LIABILITY FOR PERIODS BEFORE JULY 1, 1982. --

(1) IN GENERAL. -- If --

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period ending before July 1, 1982, and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

* * *

(4) REFUND OR CREDIT OF OVERPAYMENT. -- If refund or credit of any overpayment of an

employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act."[1]

* * *

STATEMENT OF THE CASE

On January 12, 1978, Petitioners entered into a compromise of a civil tax refund action which previously had been filed in the United States District Court for the District of Arizona. The subject matter of the compromise was the employment tax liability of Petitioners with respect to service station operators and area

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[1] Congress indefinitely extended Section 530 in the recently enacted Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-___, by removing the July 1, 1982, expiration dates. For all relevant periods in this case, however, the quoted language of the statute is applicable.

managers utilized in Petitioners' self-service gasoline stations. The other party to the compromise was the United States Department of Justice. Under the compromise, Petitioners agreed to pay additional employment taxes, interest and penalties for tax years 1970 through 1976 and agreed to treat their service station operators and area managers as employees for employment tax purposes for all periods after 1976. However, the compromise also provided that Petitioners would be relieved of their duty to comply with the employment tax requirements if there were a future change in the law. Finally, the compromise stated that Petitioners would be entitled to "appropriate refunds" if any such future change in the law were given retroactive effect.

On November 6, 1978, the President signed into law the Revenue Act of 1978. Section 530(a)(1) of the Act relieved a

taxpayer of his liability for employment taxes with respect to a category of workers if he had a reasonable basis for treating the workers as independent contractors and not as employees. Section 530(a)(4) provided for a refund of overpaid employment taxes.

Taking the position that Section 530 constituted the requisite retroactive change in law, Petitioners filed claims for refund of all amounts paid under the compromise. (Said amounts pertained to tax years 1970 through 1976.) When the Internal Revenue Service failed to allow the claims for refund, Petitioners filed suit in the United States District Court for the District of Arizona.

The case was presented to the district court on the basis of cross motions for summary judgment supported by a joint stipulation of facts. Both parties also

introduced affidavits containing conflicting interpretations of the refund provision of the compromise agreement. Petitioners' affiants stated that the refund provision was intended to apply to all tax periods. The government's affiant, however, stated that the refund provision was intended to apply only to periods after 1976.

In its Opinion, the district court held that "the government must be responsible for ambiguity added to the contract", Slip. Op., p. 4, Appendix C, infra, and, applying the rule contra proferentem, interpreted the refund provision to permit a refund of taxes paid for the period 1970 through 1976. The Ninth Circuit, however, held that the district court incorrectly applied the rule contra proferentem, stating that the district court erred in finding the government to be the drafting party of the

refund language. Timms v. United States, 678 F.2d 831, 834 (1982). The Ninth Circuit then proceeded to construe the refund provision, placing paramount importance on its location in the compromise agreement. Since the provision was located in a paragraph that pertained to periods after 1976, the court concluded that the refund provision was similarly limited to periods after 1976 and, therefore, reversed the decision in favor of Petitioners.[2]

In addressing the district court's application of the rule contra proferentem, the Ninth Circuit stated as follows in a footnote (id. p. 834, n. 2):

> "The contra proferentum rule is only invoked after a finding of ambiguity. See generally 4 S. Williston, A Treatise on the

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[2] Neither the District Court, nor the Court of Appeals, in their written opinions, commented on the conflicting affidavits.

> Law of Contracts, § 608 (3d ed. 1961). Here it is unclear whether the district court found the relevant language ambiguous. We assume for purposes of this part of our discussion that such was the finding, although we conclude infra, that reversal is required whether or not the provision at issue is considered ambiguous."

In their Petition for Rehearing before the Ninth Circuit, Petitioners pointed out that the assumption that reversal was required "whether or not the provision at issue is considered ambiguous" was inconsistent with other decisions of the Ninth Circuit, which had held (in line with the view adopted by the other circuits) that contractual ambiguities are to be resolved by the trier of fact and not by the court on motions for summary judgment. See, e.g., Castaneda v. Dura-Vent Corp., 648 F.2d 612, 619-20 (9th Cir. 1981):

> "In contract cases, summary judgment is appropriate only if the contract or the contract provision in question is unambiguous. . . . A contract or

> a provision of a contract is ambiguous if it is reasonably susceptible of more than one construction or interpretation."

The Ninth Circuit denied the Petition for Rehearing, but in its order of denial amended its opinion by removing the last sentence of footnote 2. See Order, Appendix B, infra. Accordingly, after this amendment footnote 2 of the opinion read as follows:

> "The contra proferentum rule is only invoked after a finding of ambiguity. See, generally, 4 S. Williston, A Treatise on the Law of Contracts § 608 (3d ed. 1961). Here it is unclear whether the district court found the relevant language ambiguous."

REASONS FOR GRANTING THE WRIT

This case does not fall into one of the categories typically qualifying for Supreme Court review on a petition for writ of certiorari. There is no obvious conflict between the decision of the Ninth Circuit (as amended) and that of another circuit; and the Ninth Circuit did not

depart so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), U.S. Supreme Court Rules. Cf., Key v. Wise, ___ U.S. ___, 102 S. Ct. 682, 683 (1981) (Brennan, J., dissenting). Petitioners also realize that "this Court does not sit primarily to correct what [it] perceive[s] to be mistakes committed by other tribunals", Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring), and thus the mere erroneous application of an established rule of contract law in a Federal case would generally not constitute a sufficient reason for this Court to accept the case for review. Indeed, in this case it is even difficult to accuse the Ninth Circuit of misapplying a rule of contract law since it is not clear which rule or rules were applied by the court in

reaching its decision. (This will become evident later in this Petition.)

Because of the confusion engendered by the Ninth Circuit's opinion and amendment of opinion, however, Petitioners submit that this case is appropriate for review by this Court in order to reestablish certain basic principles of contract law that would otherwise be left in doubt.

The confusion arose as follows: Petitioners' claim for tax refund was predicated on the refund provision of the compromise agreement between Petitioners and the government. Petitioners construed the provision to permit a refund of all amounts paid under the compromise agreement. The government contended that the refund provision was limited to amounts paid with respect to tax periods after 1976. In a summary judgment proceeding, the district court accepted the Petitioners' interpretation, holding that

the government should be responsible for any ambiguity added to the agreement. The Ninth Circuit reversed, accepting the government's narrower construction of the refund provision. In view of the different interpretations given the provision, however, the appellate court should have held that the provision was ambiguous, thus making summary judgment improper. See Castaneda, supra, at 619-20; see, also, Davis v. Chevy Chase Financial Ltd., 667 F.2d 160, 169 (D.C. Cir. 1981):

> "Where contractual language is susceptible of at least two fairly reasonable interpretations, this presents a triable issue of fact, and summary judgment would be improper."

Rather than remanding the case for trial, the Ninth Circuit looked to the four corners of the contract and found that, when read in context, the disputed provision limited refunds in the manner favored by the government. The Court did

not resolve the issue of contract ambiguity, merely noting that it was "unclear whether the district court found the relevant language ambiguous". See Order, Appendix B, infra.

Without an express holding from the Ninth Circuit on the question of ambiguity, we are left with the possibility of three different interpretations of the opinion. First, the Ninth Circuit may have determined that there was no ambiguity in the refund provision. Second, the Ninth Circuit may have determined that a contractual ambiguity may be resolved in a summary judgment proceeding despite a dispute in the underlying facts.[3] Third, the Ninth Circuit may have determined that there

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[3] In view of the Ninth Circuit's elimination of the language in its earlier opinion that reversal is required "whether or not the provision at issue is considered ambiguous", Timms, supra, 678 F.2d at 834, n. 2, this is the least likely interpretation.

was no dispute in the underlying facts and that it was, therefore, entitled to resolve the ambiguity in a summary judgment proceeding.

Each holding would be erroneous. The first holding would be in error because there were two reasonable interpretations of the refund provision; thus it cannot be said to be unambiguous. Castaneda, supra; Davis, supra. The second holding would be in conflict with the rule adopted by all circuits, including the Ninth Circuit, which have addressed the issue of contractual ambiguity; to-wit, a contractual ambiguity may not be resolved in a summary judgment proceeding where there is a dispute in the underlying facts. See, e.g., Davis, supra (D.C. Cir.); Bear Brand Hosiery Co. v. Tights, Inc., 605 F.2d 723, 726 (4th Cir. 1979); Christopher v. Safeway Stores, Inc., 644 F.2d 467, 471 (5th Cir. 1981); Champale, Inc. v. Joseph S. Pickett

& Sons, Inc., 599 F.2d 857, 859 (8th Cir. 1979); Castaneda, supra (9th Cir.). The third holding would be in error because there was a dispute in the underlying facts; although the case was submitted on the basis of a joint stipulation of facts, each party introduced affidavits which contained conflicting interpretations of the refund provision. Cf., Lockwood v. Wolf Corp., 629 F.2d 603 (9th Cir. 1980), applying the principle (not applicable here) that a contractual ambiguity may be resolved by a court in the absence of an underlying factual dispute.

In summary, the matter should not have been submitted to the trial court on the basis of cross motions for summary judgment. It should have been submitted to the trier of fact. The district court erroneously granted Petitioners' motion for summary judgment. The Ninth Circuit erroneously awarded summary judgment in

favor of the government and compounded that error by issuing an opinion that invites misinterpretation and confusion on the matter of contractual ambiguity.[4]

Accordingly, this Court should accept review in order to reestablish the principle that contractual ambiguities should not be resolved in a summary judgment proceeding.

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[4] The fact that Petitioners moved for summary judgment below does not estop them from now contending that there was a genuine issue of material fact and that summary judgment was thus improper. See Securities and Exchange Commission v. American Commodity Exchange, 546 F.2d 1361, 1365 (10th Cir. 1976); Davis, supra, 667 F.2d at 170.

CONCLUSION

For the above reasons, it is respectfully requested that this Court grant certiorari and review the opinion below.

October 5, 1982.

FRED LUYTIES
Post Office Box 2268
Tucson, Arizona 85702-2268
Telephone: (602) 622-3531
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERBERT W. TIMMS, dba Petrol Express, GAS-A-TRON OF ARIZONA; GAS-A-TRON CORPORATION; PETROL EXPRESS COOPERATIVE; PETROL STOPS, LTD - RIO LINDA and PETROL STOPS NORTHWEST,	)	NO. 80-5726
	)	D.C. NO. 79-249
Plaintiffs-Appellees,	)	OPINION
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
HONORABLE RICHARD M. BILBY, DISTRICT JUDGE, PRESIDING

Argued and Submitted -- January 7, 1982
Before: NELSON and REINHARDT, Circuit Judges, and EAST,* District Judge.

REINHARDT, Circuit Judge.

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*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Plaintiff taxpayers entered into a settlement agreement with the Government with respect to contested employment taxes. A provision of the settlement agreement, which the taxpayers argue entitles them to a refund of all taxes paid pursuant to the agreement, is disputed. On cross motions for summary judgment, the district court adopted the taxpayers' interpretation of the agreement and ordered a refund. The Government appealed. We reverse.

The facts are undisputed. Between 1970 and 1976 the taxpayers, related entities and an individual that market gasoline, classified their service station operators and area managers as independent contractors for federal employment tax purposes. The Internal Revenue Service disputed that classification, determined that the personnel were employees, and assessed a tax. The taxpayers paid roughly $9,000 in partial satisfaction of their

1970 and 1971 employee tax liability, and sued the United States for a refund. The Government counterclaimed.

Two years later, the taxpayers made a compromise offer pursuant to I.R.C. § 7122 (1976). A year and several amendments to the offer passed before December 1, 1977, when the taxpayers resubmitted a proposed settlement. By a letter dated January 12, 1978, in which it made some minor revisions, largely editorial, to the taxpayers' proposal, the Government accepted. The taxpayers performed under the agreement by making an approximate $365,000 down payment on the compromised amount. A further $137,000 plus interest was payable in installments over 30 months.

In paragraph 7, the compromise agreement provides inter alia:

> The taxpayers will continue to treat service station operators and area managers as employees for federal

income tax withholding, FICA's and FUTA purposes in all succeeding calendar quarters so long as any taxpayer compensates station operators or area managers; provided, however, that in the event that the Internal Revenue Code or any official governmental interpretation thereof is amended to treat such or similar individuals as independent contractors and not as employees, then as of and after the effective date of any such change in the Internal Revenue Code or in any official governmental interpretation thereof, taxpayers will not be required to comply with Federal income tax withholding, FICA or FUTA provisions in regard to the service station operators and/or area managers employed by them as of and after such effective date and will be entitled to

appropriate refunds if such changes are given retroactive effect.

Subsequent to the taxpayers' commencement of installment payments under the agreement but before their completion of such payments, Congress enacted section 530 of the Revenue Act of 1978, P.L. 95-600, 92 Stat. 2885 (current version at I.R.C. § 3401 note (Controversies Involving Whether Individuals are Employees for Purposes of Employment Taxes)). The statute provides that a taxpayer who has a "reasonable basis" for not treating personnel as employees shall be relieved of employment tax liability, subject to certain time period limitations. The law is retroactive and refunds of payments are authorized if the refunds are "not barred on the date of the enactment of this Act by any law or rule of law." Revenue Act of 1978 § 530(a)(4).

Following Section 530's enactment, the government relieved the taxpayers of (1) their obligation to make the remaining installment payments and (2) their obligation under paragraph 7 of the compromise agreement to treat their personnel as employees, since the parties agreed that the taxpayers had a "reasonable basis" for their independent contractor view.

Unsatisfied with these developments, the taxpayers filed for a refund of amounts paid under the settlement agreement for the years 1970-76. When the government denied this request, the taxpayers, relying on the paragraph 7 provision, brought this lawsuit in the district court. The district court held that paragraph 7 required a refund of all amounts paid under the settlement agreement.

We consider first whether, if the district court's construction of the settlement agreement is correct, the

taxpayers would be permitted to obtain a refund under section 530. We think they would.

The legislative history of Section 530 makes it clear that in the ordinary section 7122 case the taxpayer may not obtain a refund of amounts previously paid. The House Committee Report states:

> Taxpayers who have entered into final closing agreements under Code section 7121 or compromises under section 7122 with respect to employment status controversies are ineligible for relief under the bill, unless they have not completely paid their liability. Thus, for example, a taxpayer who has agreed or compromised a liability for an amount which is to be paid in installments, but who still has one or more installments to pay, is relieved of liability for such outstanding installments.

H.R.Rep.No. 95-1748, 95th Cong., 2d Sess. 6 (1978), 1978-3 (vol. 2) C.B. 629, 634.

This legislative history is consistent with the statutory language. On its face, the statute permits refunds only if they are not barred by an existing "law or rule of law." The "rule of law" which is normally applicable to a section 7122 compromise is that such compromises are final and may not be reopened in the absence of fraud or mutual mistake. See 26 C.F.R. § 301.7122-1(c).[1] Thus, in the case of payments made under an ordinary section 7122 compromise agreement, refunds would be barred by the provisions of section 530: the rule of finality governing a section 7122 compromise would constitute a "rule of law" within the meaning of that section.

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[1] No such fraud or mutual mistake is alleged here.

Here, however, unlike the ordinary section 7122 compromise, the agreement itself contains a refund provision. Accordingly, our analysis must be different. The government neglects that difference by attempting to apply the rule of finality to the agreement before us as though there were no refund provision in the agreement. The government's argument is patently erroneous. Where the agreement itself provides for a refund upon passage of legislation retroactively changing the applicable tax law, the rule of finality does not bar a refund upon the happening of that event. The rule of finality means simply that the terms of the agreement, (including the provision for refund), are final; it does not mean that payments made pursuant to the agreement are final, unless, of course, that is what the agreement provides.

Two cases construing compromise agreements make this point. In United States v. Lane, 303 F.2d 1 (5th Cir. 1962), the court held that where an agreement permits the government to disregard the compromised amount upon the taxpayer's breach, the government can do so without violating the rule of finality. The court reasoned that in seeking to recover the full amount it had claimed prior to the compromise, the government was merely exercising its right under the compromise agreement to seek full recovery upon the taxpayer's breach. The Third Circuit reached a similar result in United States v. Feinberg, 372 F.2d 352 (3d Cir. 1967). There, the court held that where the compromise agreement provided that the government could terminate it upon default by the taxpayer, the government was free to do so without offending or even implicating the rule of finality.

The government views these cases as "an exception to this rule of finality" and then announces that this exception "protects the government only." We reject both these innovative theories. The Third Circuit and Fifth Circuit cases are not an exception to the rule of finality at all. They stand for no more than the proposition that an agreement is an agreement and that the taxpayer is bound by its terms. So too is the government.

We hold that neither the rule of finality nor the provisions of section 530 bars refunds which are expressly provided for in section 7122 compromise agreements.

The remaining issue is whether the refund provision of the compromise agreement contemplates a refund of the amounts sought here. Specifically, the question is whether the settlement agreement provides for a refund of all payments made pursuant to that agreement,

as the district court concluded, or only of all payments attributable to periods covered by paragraph 7 of the agreement, as the government urges. Since no payments were made by the taxpayer for periods covered by paragraph 7 of the agreement, the government must prevail if its construction of the settlement agreement is correct.

We first address a preliminary matter: the district court's application of the rule that an ambiguous contract term should be interpreted against the party drafting the term (the contra proferentum rule).[2]

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[2] The contra proferentum rule is only invoked after a finding of ambiguity. See generally 4 S. Williston, A Treatise on the Law of Contracts, § 608 (3d ed. 1961). Here it is unclear whether the district court found the relevant language ambiguous. We assume for purposes of this part of our discussion that such was the finding, although we conclude infra, that reversal is required whether or not the provision at issue is considered ambiguous.

We think the district court erred in finding the government to be the drafting party of the refund language. While it is true that the government rearranged and edited various portions of the taxpayers' December 1, 1977 settlement proposal, there is little question that the taxpayers originated the refund provision, drafted the basic language and placed the provision in a section of their offer covering

"succeeding calendar quarters."[3] The differences in language between the final agreement and the agreement as proposed by

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[3] The taxpayers letter stated:

> . . . The taxpayers will continue to treat service station operators and area managers as employees for Federal income tax purposes
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> . . . in all succeeding calendar quarters so long as any taxpayer compensates station operators or area managers; provided, however, that in the event the Internal Revenue Code or any official governmental interpretation thereof is amended to treat such or similar individuals as independent contractors and not employees, then as of the effective date of any such change in the Internal Revenue Code or in any official governmental interpretation thereof, taxpayers will not be required to comply with Federal Income Tax withholding, FICA or FUTA provisions in regard to service station operators and/or area managers compensated by them, and the taxpayers further will be entitled to an appropriate refund of Federal income tax withholding, FICA or FUTA taxes, interest and penalties paid with respect to compensation paid to such individuals if the change in the Internal Revenue Code or official governmental interpretation thereof is given retroactive effect.

the taxpayers do not affect the outcome of the present dispute. Whichever version we examined, we would conclude that the taxpayers are not entitled to the refunds they seek here. Under these circumstances, the district court's invocation of the contra proferentum rule against the government was erroneous.

We turn now to the construction of the refund language. The decisive aspect of the refund language is its location in the settlement documents. It is a proviso to paragraph 7. That paragraph says absolutely nothing about the taxpayers' liability for the period 1970-1976. Nor does paragraph 11 of the taxpayers' letter, where the refund proposal was originally set forth. Paragraph 7 of the final agreement, like paragraph 11 of the taxpayers' letter, contains no dollar figure relating to a settlement of the 1970-1976 liability nor any provisions setting out an install-

ment payment schedule. The various understandings regarding the 1970-1976 taxes are set out, in detail, in other parts of the agreement and the taxpayers' letter.[4]

Paragraph 7 governs the treatment of post 1976 taxes. It provides that after

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[4] Thus, paragraph 1 of the government's letter of agreement is an agreement to discharge certain federal tax liens related to employment tax liabilities for 1970 and 1971. Paragraph 2 is a payment schedule. Paragraph 3 is an agreement to secure a portion of the taxpayers' indebtedness by delivery of two mortgages. Paragraph 4 states explicitly that the $511,323 payment applies to calendar quarters through June 30, 1976. Paragraph 5 is an agreement covering deductibility of certain of the payments. Paragraph 6 sets a payment for two particular quarters. Paragraph 8 binds successor entities operated by the taxpayers to the agreement. Paragraph 9 treats the federal tax status of FUTA taxes paid or to be paid to any state's Unemployment Insurance Fund.

certain dates in 1977 (generally January 1),[5] the taxpayers will accept and comply with the IRS's characterization of their service station operators and area managers as employees for federal employment tax purposes. The refund language appears in a conditional phrase in that paragraph beginning "provided, however." The term "provided, however," conditions the promise or promises made in the sentence of which it is a part: it does not condition each promise in the entire

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[5] The fact that the paragraph refers only to periods after January 1, 1977, is confirmed by the phrase in "all succeeding calendar quarters."

agreement.[6] Thus, the language following "provided, however," qualifies the taxpayers' rights and obligations under paragraph 7, and relates to their post-1976 taxes; it does not qualify their rights and obligations under paragraphs 1 through 6

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[6] If conditional clauses were, as a general matter, interpreted to qualify every promise made in a document, then drafting any relatively complex agreement would become exceptionally laborious since any condition imposed would have to be limited explicitly to a particular promise or promises.

and does not relate to their 1970-1976 taxes.[7]

Paragraph 7 protects the taxpayers' position in two ways. First, if the Government's view of the personnel's legal status is changed to conform to the taxpayers' independent contractor contention, the taxpayers are relieved, as of the date of that change, of any further obligation under paragraph 7 to conform to the prior government view. Second, if the Government's view changes, the taxpayers are entitled to refunds of amounts paid

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[7] In paying money to settle liabilities for 1970-1976, the taxpayers did not agree to the government's characterization of their personnel for the period beginning January 1, 1977. Thus if paragraph 7 with its reference to "all succeeding calendar quarters," had not been included in the agreement, the taxpayers would have been free to continue their treatment of the operators and managers as independent contractors after settling their 1970-1976 liabilities. Of course, any such treatment might have exposed the taxpayers to further claims by the government for tax liabilities for the years after 1976.

under the provisions of paragraph 7, i.e., to a refund of all taxes paid for years after 1976. Thus, the agreement provides only for refunds of amounts paid by the taxpayers pursuant to paragraph 7. It does not provide, however, for the refund of the compromise amount agreed to be due for the years 1970-1976, i.e., the amount to be paid pursuant to paragraphs 1 through 6 of the agreement.

We conclude that the compromise agreement provides for the refund of taxes paid for the years 1977 on, but not for the years 1970-1976. In their complaint, the taxpayers do not allege that any payments were made for periods after January 1, 1977, or seek a refund of any such payments. Thus, while we hold that the refund provision of the compromise agreement is valid and enforceable, and that it is neither barred by the rule of finality nor contrary to the provisions of

section 530, the provision does not entitle the taxpayers to the relief sought here.

For the reasons stated, the district court's judgment is reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERBERT W. TIMMS, dba Petrol Express, GAS-A-TRON OF ARIZONA; GAS-A-TRON CORPORATION; PETROL EXPRESS COOPERATIVE; PETROL STOPS, LTD - RIO LINDA and PETROL STOPS NORTHWEST,	)	NO. 80-5726
Plaintiffs-Appellees,	)	D.C. NO. 79-249
vs.	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendant-Appellant.	)	

Before: NELSON and REINHARDT, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above case has voted to amend its opinion as follows:

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*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

At slip. op. page 2394, column 2, last line of column: change the word "employees" to "independent contractors."

Footnote 2 is amended to read as follows:

> "2 The contra proferentum rule is only invoked after a finding of ambiguity. See generally 4 S. Williston, A Treatise on the Law of Contracts, § 621 (3d ed. 1961). Here it is unclear whether the district court thought that the relevant language was ambiguous."

The petition for rehearing is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HERBERT W. TIMMS, dba Petrol Express; et al.,	)	
Plaintiffs,	)	No. CIV 79-249 TUC-RMB
vs.	)	
UNITED STATES OF AMERICA,	)	ORDER
Defendant.	)	

This action is before the Court on cross motions for summary judgment. The facts giving rise to the case are not in dispute. During the period 1970-1976, plaintiffs did not withhold employment taxes on compensation paid to service station managers and area managers, treating these individuals as independent contractors for tax purposes. The Internal Revenue Service determined that the

managers were employees, and demanded payment for the period. Plaintiffs disagreed and filed suit in this Court for a determination. The parties agreed to compromise and settle that lawsuit. The compromise settlement was reached after plaintiffs sent the Internal Revenue Service a proposal that contained the following language on December 1, 1977:

> ". . . The taxpayers will continue to treat service station operators and area managers as employees for Federal income tax purposes . . . in all succeeding calendar quarters as long as the taxpayer compensates station operators or area managers; provided, however, that in the event the Internal Revenue Code or any official governmental interpretation thereof is amended to treat such or similar individuals as independent contractors and not employees, then as of the effective date of such changes in the Internal Revenue Code or in any official governmental interpretation thereof, taxpayers will not be required to comply with Federal Income Tax witholding, [sic] FICA or FUTA provisions in regard to service station operators and area managers compensated by

them, and the taxpayers will further be entitled to an appropriate refund of Federal income tax withholding, FICA or FUTA taxes, interest and penalties paid with respect to compensation paid to such individuals if the change in the Internal Revenue Code or official governmental interpretation thereof is given retroactive effect." (emphasis supplied)

The offer from plaintiffs was accepted by the Government in a letter that contained the following language:

"The taxpayers will continue to treat service station operators and area managers as employees for federal income tax purposes in all succeeding calendar quarters so long as any taxpayer compensates station operators or area managers; provided, however, that in the event that the Internal Revenue Code or any official governmental interpretation thereof is amended to treat such or similar individuals as independent contractors and not as employees, then as of and after the effective date of any such change in the Internal Revenue Code or in any official governmental interpretation, taxpayers will not be required to comply with Federal income tax withholding, FICA or FUTA provisions in regard to the service station operators and or area managers employed by

them as of and after such effective date will be entitled to appropriate refunds if such changes are given retroactive effect." (emphasis supplied)

The compromise agreement provided that plaintiffs would pay $365,000 down and an additional $171,000 plus interest in installments over a period of 30 months.

Section 530 of the Revenue Act of 1978 was enacted subsequent to the parties reaching this settlement. It provided that taxpayers that had a "reasonable basis" to dispute the status of individuals as employees or independent contractors would be relieved from employment tax liability. The parties to this case have stipulated that plaintiffs had a "reasonable basis" to dispute the classification of the station managers and area managers as employees. The statute further provided for retroactive effect, providing application "is not barred on the date of the enactment of this Act by any law or rule of law."

Subsequent to enactment of the statute, the government relieved plaintiffs of the obligation to make further payments on the installment portion of the above settlement agreement, and refunded one payment that had been made subsequent to the Act's effective date.

The narrow question before the Court is whether the compromise agreement provides for refund of amounts paid under the settlement agreement. The first question is which language for the refund provision should be construed; that contained in plaintiffs' "offer," or the language in the government's "acceptance." Since the government changed the language, it should be construed as a counteroffer, which was accepted by performance of the agreement by plaintiffs. However, as drafting party of the changed language, the government must be responsible for ambiguity added to the contract by the

changed language of the refund provision. When the relevant portion of the refund provision of the government's acceptance is read in context, there is little question that the provision applies to the instant case.

There is no question that the statute was given retroactive effect,[1] and, therefore, the taxpayer is entitled to appropriate refund. The government's reading of the provision is very strained and would require construction in favor of the drafting party.

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[1] Refund or credit of overpayment. -- If refund or credit of any overpayment of an employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act. Section 530(a)(4), Revenue Act of 1978.

IT IS ORDERED that defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that plaintiffs' Motion for Summary Judgment is GRANTED.

The Clerk is directed to enter JUDGMENT in favor of the plaintiffs and against the defendant in the amount of $326,627.05 plus statutory interest from date payments were made under the settlement agreement.

The Clerk is directed to mail copies of this Order to all counsel of record.

DATED: July 31, 1980.

RICHARD M. BILBY
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-631

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT W. TIMMS, dba PETROL EXPRESS
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether a compromise agreement between petitioners and the Internal Revenue Service, settling a dispute over the employment status of certain individuals working for petitioners, did not entitle petitioners to a refund of the amounts paid pursuant to the compromise agreement with respect to the taxable years 1970 through 1976.

1. The pertinent facts may be summarized as follows: In 1974, petitioners brought suit for a refund of federal employment taxes on the ground that certain area and service station managers working for petitioners were independent contractors for federal employment tax purposes. The government counterclaimed for additional employment taxes. On December 1, 1977 petitioners submitted an offer in compromise, which was finally accepted by the

government on January 12, 1978. The compromise settled petitioners' disputed tax liability for the taxable years 1970 through 1976 for the fixed sum of $545,912.68, and bound petitioners to treat the individuals as employees from and after January 1, 1977 (Pet. App. A-3, A-17). One of the numbered paragraphs in the agreement, which dealt with petitioners' undertakings for the period after 1976, contained a clause providing for refunds in the event of a future retroactive change in the law regarding the status of the disputed workers (Pet. App. A-3 to A-4).

After petitioners had made substantial payments on the 1970-1976 liability, Congress enacted Section 530 of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2885, which provided that any taxpayer then involved in a controversy over the employment status of certain workers, who had a "reasonable basis" for treating these workers as independent contractors, would be relieved of employment tax liability. The statute provided for refunds subject to certain time limitations (Pet. App. A-5).

Pursuant to the new statute, the government abated the remaining unpaid portion of the $545,912.68, and relieved petitioners of their obligation to treat the workers as employees. Petitioners thereupon filed a suit for the refund of the amounts already paid under the agreement (Pet. App. A-6). Petitioners moved for summary judgment and the government filed a cross-motion for summary judgment (Pet. App. C-1). The district court held for petitioners on the ground that the refund clause in the agreement was ambiguous; that the government, as the drafting party, was responsible for the ambiguity; and that, accordingly, the ambiguity was to be resolved against the government. (Pet. App. C-5 to C-6). The court of appeals reversed (Pet App. A-20 to A-21). The court held that petitioners, rather than the government, were the drafting party and that, accordingly, the district court erred in holding the government

responsible for any ambiguity in the agreement. The court further held that given the introductory provision of the refund clause and its position within the compromise agreement as a whole, i.e., appearing in a paragraph dealing only with periods after 1976, petitioners would not be entitled to a refund for amounts paid with reference to the taxable years 1970 to 1976 (Pet. App. A-18 to A-20).

The decision below, involving only the construction of a particular compromise agreement, does not warrant this Court's review. Moreover, the court of appeals correctly held that the compromise agreement did not entitle petitioners to a refund for the years 1970 through 1976. The agreement, drafted and redrafted by petitioners' attorneys, contained several distinct paragraphs, each dealing with one particular aspect of the dispute between petitioners and the government. Only one of these paragraphs dealt with periods beginning with 1977, and it was this paragraph, and only this paragraph, that contained any reference to refunds in the event the applicable law changed retroactively. There was no general clause addressing either refunds or prospective legal changes, although there was a general clause binding petitioners' and successor entities. The court of appeals, therefore, correctly concluded that the refund clause applied only to payments made with reference to taxable years after 1976, and was inapplicable to the payments before the court.

Contrary to petitioners' argument (Pet. 13-14), the decision below does not hold that a contractual ambiguity may be resolved in a summary judgement proceeding. The footnote in the opinion below, on which petitioners rely in support of their contention, means nothing more than that, whatever the meaning of the words used in the refund clause, the position of that clause limits its reach to payments other than those in issue. Thus, the ambiguity of the

language is irrelevant because the location of the clause determines its scope. Accordingly, petitioners' hypotheses regarding the court's resolution of the question whether there was an ambiguity in the refund provision is also irrelevant, because the court did not have to, and did not, address the question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11